

potential strategic investors and financiers who were interested in partnering with Mr. Johnson because of his established leadership in the communications industry and the measures adopted by the Commission to remove traditional barriers to minority investment. In reliance on the minority business exception to the affiliation rules, Mr. Johnson was able to reach a tentative agreement with a major investor to bid jointly in the C Block auction. Prior to the proposed rule changes, Mr. Johnson also formed B & P to participate in the C Block auction. These actions, taken in reliance on the Commission's prior rules, provide a more than sufficient basis to grant this waiver, particularly in light of the harm suffered by Mr. Johnson if an appropriate accommodation of the rules is not made.^{25/}

As Commissioner Barrett pointed out in his concurring statement to the Further Notice, few minorities have been successful bidders in the PCS auctions that have already been held. Many minority-owned businesses intended to use the C Block auction as their vehicle to enter the PCS market, and most minority-owned businesses, including B & P, did not even attempt to bid in the A and B Block auctions because they knew that they could not effectively compete with the well-financed coalitions

^{25/} B & P submits that grant of a waiver is an appropriate vehicle for recognizing that the Commission's response to Adarand will have disastrous consequences for B & P's participation in the C Block auction. See Adarand, 63 U.S.L.W. at 4532 (indicating that detrimental reliance is a factor to consider when the courts propose to change the law). Grant of the waiver will provide an appropriate transition for analyzing and prospectively imposing the standards set forth in Adarand.

of some of the largest telephone and cable companies in the world. The C Block auction, the last auction for 30 MHz blocks of spectrum, represents the only realistic opportunity for minority-owned businesses to compete with cellular and A and B Block PCS licensees.

If the Commission adopts its proposed rules and eliminates the minority-owned business exception to the affiliation rules, Mr. Johnson and B & P will be excluded entirely from participation in the PCS C Block auction. Having justifiably relied on the current rules in arranging corporate affairs and negotiating investments and financial arrangements, Mr. Johnson and B & P face the possibility of being barred from participating in the most significant development in the arena of wireless telecommunications.

Further, Mr. Johnson's and B & P's investment of time and money in preparing for the C Block auction cannot be used for any other purpose because the C Block is the last block of 30 MHz PCS spectrum to be auctioned.^{26/} Other companies, knowing that they could not bid in the C Block, were able to plan to participate in the A and B Block auctions. After considering the

^{26/} The future availability of 10 MHz of PCS spectrum in the F Block is insufficient to support B & P's proposed use of the PCS spectrum. As the Commission recognized early in the PCS rulemaking proceeding, 10 MHz of spectrum does not provide enough bandwidth to support sophisticated two-way telecommunications services. In fact, the Commission specifically has recognized that the 10 MHz blocks will only support the provision of "niche" services. See e.g. Memorandum Opinion and Order, Amendment of the Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 at ¶ 12 (released June 13, 1995).

financial resources that would have been required to compete in the A and B Block auctions against coalitions of some of the world's largest and wealthiest telecommunications companies, and after studying the alternatives created by the C Block auction, Mr. Johnson and BHI decided to forego opportunities to form alliances to participate in the A and B Block auctions and, in reliance on the rules promulgated by the Commission to encourage minority participation in the C Block auction, elected to concentrate their efforts on the C Block auction.

Mr. Johnson's inability to bid in the prior auctions is evidenced by the Commission's findings in the rulemaking proceeding.^{27/} Moreover, perhaps the most telling evidence that minorities are likely to be left behind in the PCS revolution because of discrimination in the capital markets may be seen in the results of the narrowband auctions in which minorities had the opportunity to obtain PCS licenses using bidding credits. In the nationwide narrowband auctions, despite the availability of a 25% bidding credit on certain licenses, not a single minority-owned firm was awarded a PCS license.^{28/} Granting the waiver will

27/ See Fifth Report and Order at 5537, ¶ 10 ("[I]t should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by . . . businesses owned by minorities . . . by raising the cost of entry into spectrum-based services.").

28/ See "Bidding Battle for Airwaves Goes Sky High," Washington Post, A1, July 30, 1994. See also Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS and Amendment of the Commission's Rules (continued...)

give Mr. Johnson through B & P an equal opportunity to compete for 30 MHz of PCS spectrum in the upcoming PCS auctions and will increase the potential for meaningful participation in PCS by a member of a minority group.

D. Preserving Business Plans and Strategic Alliances

Granting the waiver will preserve Mr. Johnson's and B & P's business plans, strategic alliances and financial arrangements. In the recently released Further Notice, the Commission recognized that the proposed changes in the PCS rules would disrupt unnecessarily the business plans of certain potential applicants.^{29/} Specifically, the elimination of the exception to the affiliation exemption rule would place in jeopardy the participation of minority-owned entities that were afforded the benefit of the exclusion rule. Granting this waiver will ensure the opportunity for Mr. Johnson and B & P to play a significant role in the future deployment and development of PCS and will ensure that B & P will remain an attractive partner for strategic investors.

Despite persistent efforts, Mr. Johnson was unsuccessful, and likely would continue to be unsuccessful, in attracting a strategic investor if B & P does not qualify as a

28/ (...continued)
to Establish New Narrowband Personal Communication Services, 10 FCC Rcd 175, 178 (1994) at ¶ 4 ("Third Memorandum").

29/ See e.g. Further Notice at ¶ 20 ("[W]e tentatively conclude that such rule change will affect a limited number of existing business relationships").

"small business," eligible for enhanced preferences under the Commission's rules. Mr. Johnson has repeatedly been informed by potential investors that they would rather partner with a entity that has the maximum benefits available under the Commission's rules, even though these entities may be newly formed and lacking in experience and successful participation in a communications-related industry. The public interest plainly would be served by permitting Mr. Johnson, an experienced and accomplished minority businessman, through B & P, to compete in the C Block auction as a small business, based not only on their prior reliance on the Commission's rules, but based also the fact that without qualifying as a small business Mr. Johnson and B & P otherwise will be unable financially to compete for 30 MHz PCS licenses because they will be unable to attract a strategic partner.

E. Historical Commitment to Serving the Disadvantaged

Mr. Johnson offers a perspective and approach to PCS that will lead to the broad availability of wireless telecommunications services to all segments of the communities he intends to serve. Through his involvement in BHI, Mr. Johnson has taken significant steps to ensure that disadvantaged groups and communities are benefited by his investments and business ventures. In addition to offering programming that targets the needs of a community segment historically under-served, and in fact unserved, by traditional cable networks and programmers, Mr. Johnson has directed the operations of BHI to benefit the minority community on a number of levels. Most recently, for

instance, Mr. Johnson was instrumental in locating BHI's new corporate headquarters and production facilities in an enterprise zone located in Northeast Washington D.C. As such, Mr. Johnson assisted in revitalizing minority communities that have been unable to attract businesses, jobs and investment capital. The Administration has indicated that favored status would be appropriate for people whose businesses are in economically disadvantaged areas such as inner cities.^{30/} Accordingly, encouraging the participation of Mr. Johnson in the C Block auction, in light of his proven commitment to serving the needs of the disadvantaged, will further the Commission's goals of providing telecommunications service to under-served urban or rural areas in furtherance of the national policy to provide universal telecommunications service.^{31/}

F. Redressing Anomalies in the Rules

Grant of B & P's waiver request will redress anomalies in the Commission's rules created by the special treatment afforded small business consortia and wealthy individuals. Under the Commission's proposed rules, for instance, a small business consortium comprised of four companies each with \$39 million in gross revenues would benefit from the 25 percent cumulative

^{30/} See "Clinton Wants Set-Asides to Boost Poor Areas", Washington Post, July 15, 1995 at A1, cl. 1.

^{31/} See Separate Statement of Commissioner Andrew C. Barrett, Fifth Report and Order, Competitive Bidding (released July 15, 1994) (stating that the auction rules for broadband PCS were created, in part, to achieve universal service goals through a competitive, private investment framework).

bidding credit, while Mr. Johnson and B & P, participating individually with significantly less revenues than the combined consortium, would be prohibited from participation altogether if a waiver of Section 24.709(a) is not granted.^{32/} Accordingly, contrary to the Budget Act and Commission policies underlying the entrepreneur block rules, a firm with less access to capital will be disproportionately disadvantaged. Indeed, the proposed rules will permit a consortium of small businesses, with significant revenues and assets, to participate in the C Block auction while an individual member of a minority group is unable to participate because of his or her disqualifying affiliates.

Similarly, denial of the waiver would undermine Congress's goal of providing an opportunity for companies facing financial disadvantages by permitting wealthy individuals that do not control other companies ("affiliates") to participate and yet disqualifying B & P from participating in the auctions because of Mr. Johnson's control of BHI. Consequently, wealthy individuals who have large non-controlling stakes in companies will be able to participate and receive the maximum benefits afforded to entrepreneur block eligibles while Mr. Johnson will be barred from participating altogether, simply because BHI's assets are attributed pursuant to Section 24.709(a). Grant of a waiver to B & P would correct this anomaly and permit a company facing significant barriers to capital to compete for 30 MHz PCS

^{32/} There is no limit on the financial assets small businesses or persons can aggregate under this rule.

licenses as intended by Congress and the Commission's entrepreneur block rules.

G. Limited Extent of Waiver

Grant of this waiver request is appropriate because it is limited in nature and is narrowly tailored to address unique circumstances. Permitting B & P to participate in the C Block auction is not granting B & P a PCS license or any absolute benefit. Rather, grant of the waiver will only give B & P an opportunity to bid for broadband PCS licenses, without any guarantee of success. Because B & P has only limited access to capital, a problem shared by others in the block, grant of a waiver will not harm entities eligible to bid in the upcoming auctions under the Commission's proposed competitive bidding rules for broadband PCS. The effect of this waiver also is of limited duration, applying only to B & P's participation in the upcoming C Block auction.

Grant of the waiver also will not provide a vehicle for otherwise non-qualified companies to bid in the block. The foregoing illustrates the unique circumstances of B & P's proposed participation in the entrepreneur block auction. Few companies, if any, will be able to proffer similar bases for a grant of an identical waiver, particularly in light of the Commission's efforts to preserve the business plans of many of the companies affected by the Commission's proposed rule changes.

Moreover, most of the companies that are ineligible to bid in the C Block auction have already participated individually

in the A and B Block auctions or have formed alliances that would permit their limited participation in the C Block. It is unlikely that these arrangements will be dismantled, at this late date, to permit an ineligible company to participate on its own. In addition, many of the established alliances will permit otherwise unqualified companies to benefit from the maximum preferences afforded to small businesses in the auction process. This result eliminates any benefit in seeking a waiver of the Commission's competitive bidding rules similar to B & P's request.

IV. Relevant Years for Determining C Block Eligibility and Small Business Status

Pursuant to Section 24.720(f) of the Commission's rules, the relevant years for determining compliance with the entrepreneur block eligibility requirements and small business definition for the upcoming C Block auction are 1993, 1992 and 1991 for companies whose financial caps are based on financial statements prepared on a calendar-year basis.^{33/} However, for

^{33/} Section 24.720(f) of the Commission's rules provides:

Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g. cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). See 47 C.F.R. § 24.720(f).

companies preparing their financial statements on a fiscal year basis, the rule provides that the relevant years for determining eligibility are the most recent years preceding the filing of the short form application - 1994, 1993 and 1992.

Because BHI prepares its financial statements on a fiscal year basis, the Commission's rules would require that B & P's eligibility be determined by BHI's revenues in 1994, 1993 and 1992. Assuming that the Commission eliminates the affiliation exemption currently in place for the benefit of minority members of an applicant's control group, B & P would be prevented from bidding in the upcoming auction based on BHI's 1994 revenues because B & P's attributed revenues would exceed the entrepreneur block financial cap of \$125 million.

B & P requests that the calculation of BHI's revenues for purposes of determining its eligibility to bid in the entrepreneur's block be based on BHI's audited financial statements for the relevant number of fiscal years preceding January 1, 1994. Historically, BHI has prepared its financial statements based on a fiscal year ending July 31. It has followed this practice since 1980, approximately 15 years before the adoption of Section 24.720(f).

B & P submits that the public interest would be served by grant of this waiver request. There is no rational basis for disqualifying B & P from participating in the C Block auction simply because BHI has adopted a different method of accounting under the Commission's PCS rules. The effect of the decision

would be to permit companies to bid, whose present revenues exceed B & P's attributable revenues, while barring B & P's intended participation simply because BHI accounts for its revenues and assets pursuant to a schedule that concludes the fiscal year on July 31.

Excluding B & P from the auction would undermine the Commission's goal of providing firms of limited size from participating in the competitive bidding process. The fact that BHI's choice of an accounting method would place B & P only slightly over the entrepreneur block financial caps should not prevent its participation when similarly situated companies at the time, that have adopted a different accounting method, would be permitted to compete for C Block licenses. Considering B & P's eligibility to bid based on the same years considered for companies that operate on a calendar year basis will reflect fairly the relative ability of the two companies to compete in the C Block auction and will appropriately identify those companies that should benefit from participating in the entrepreneur block auctions. Accordingly, B & P requests a waiver of Section 24.720(f).

V. Conclusion

For the foregoing reasons, B & P urges the Commission to grant its limited waiver request and permit the company to participate in the upcoming C Block auction as a small business. The special circumstances described herein demonstrate that a waiver is necessary to achieve Congress's goal of disseminating licenses among a wide variety of applicants. Grant of a waiver also will provide B & P, a company with limited access to capital, the financial wherewithal to participate in the broadband PCS competitive bidding process, as contemplated by the Budget Act and the entrepreneur block rules. The waiver is supported by the unique circumstances under which B & P has sought to bid on C Block PCS licenses, and the extent to which grant of the waiver will serve the Commission's policy goals.

Respectfully submitted,

B & P PCS, Inc.

By:  Leonard J. Kennedy
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July 17, 1995

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act -)	
Competitive Bidding)	
)	
Amendment of the Commission's)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule)	
)	
Implementation of Section 3(n) and 332)	
of the Communications Act)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services)	

AFFIDAVIT OF ROBERT L. JOHNSON

City of Washington)
) ss:
District of Columbia)

I, Robert L. Johnson, being first duly sworn, depose
and say as follows:

1. I am providing this affidavit in support of B & P
PCS, Inc.'s Emergency Request for Waiver of the Commission's
Rules in the above-referenced proceeding.

2. I am the President and Chief Executive Officer of
BET Holdings, Inc. ("BHI"). I am also the sole shareholder in
and Director of B & P PCS, Inc. ("B & P"). I am making this
affidavit upon personal knowledge of the facts stated herein.

3. BHI is one of a small number of successful
minority-owned communications businesses in the United States.
BHI has long been an advocate of government policies designed to
diversify control of media interests and to remedy the historic

under-representation of minorities in the communications marketplace. B & P is a new corporation formed on June 16, 1995 to participate in the C Block PCS auction scheduled to commence on August 29, 1995.

4. As President and Chief Executive Officer of BHI, I am responsible for daily executive level decision-making. For the past two (2) years, I have directed BHI's initiative to enter the emerging wireless telecommunications market through the provision of Personal Communications Services ("PCS").

5. As I considered various alternatives for entry into the PCS market, it was my understanding that the Commission recognized that businesses owned by minorities had historically been excluded from providing spectrum-based services due to lack of access to capital and lending discrimination, and that the use of auctions as the means of disseminating PCS licenses threatened to erect an additional barrier to minority participation by raising the cost of entry into the industry. It was my further understanding that the Commission had designed the C Block auction rules specifically to lessen these additional barriers to minority participation in the PCS marketplace.

6. After considering the financial resources that would have been required to compete in the A and B Block auctions against coalitions of some of the world's largest and wealthiest telecommunications companies, and after studying the alternatives created by the C Block auction, BHI decided to forego opportunities to form alliances to participate in the A and B Block auctions and, in reliance on the rules promulgated by the

Commission to encourage minority participation in the C Block auction concentrated its efforts exclusively on the C Block auction.

7. BHI has been making plans to participate in the PCS C Block auction since the passage of the Budget Act in 1993. BHI has been actively involved in the Commission's rule makings since that time, and has devoted considerable time and resources to finding a strategic partner in anticipation of active participation in the C Block auction. BHI has informed the Commission of its interest in participating in the C Block auction through numerous pleadings BHI has filed in this proceeding.

8. In preparation for the C Block auction, I personally met with several potential investors and financiers in the capital markets, some of whom were interested in partnering with BHI because of both BHI's established leadership in the telecommunications industry and the race-based measures adopted by the Commission to remove traditional barriers to minority investment.

9. Many potential partners informed me that they would not be interested in partnering with BHI unless the proposed PCS minority applicant was permitted to bid as a small business, eligible for the maximum preferences available for entrepreneur block participants. In response, and in light of the exception to the affiliation rules, I formed B & P to participate as a small minority-owned business in the C Block

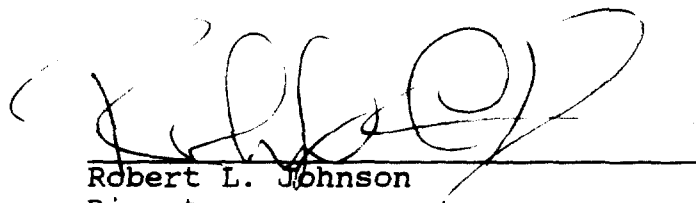
auction. It was anticipated that BHI would benefit from B & P's auction participation through the provision of financing by BHI to B & P at commercially reasonable rates.

10. In reliance on the minority business exception to the affiliation rules, I was able to arrange suitable corporate affairs and form a tentative partnership with a major investor to bid in the C Block auction.

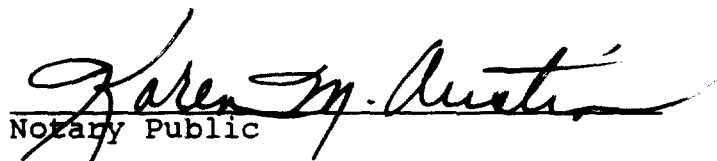
11. The Commission's proposal to eliminate the minority business exception to the affiliation rules will exclude B & P from participation in the C Block auction. Having relied on the continued availability of the C Block auction, I am is now in the position of being excluded from the C Block auction and will be denied the opportunity to be a major competitor in the PCS market. The C Block auction is the last auction for 30 MHz blocks of PCS spectrum. I understand that a small number of other minority-owned businesses are similarly situated in that elimination of the minority-owned business exception to the affiliation rules will result in their exclusion from the C Block auction.

Further affiant sayeth not.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the content of the foregoing paper is true.


Robert L. Johnson
Director
B & P PCS, Inc.

SWORN AND SUBSCRIBED TO BEFORE ME
this 17th day of July, 1995.


Notary Public

My Commission Expires: KAREN M. AUSTIN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 14, 1998